

Myanmar's Draft Right to Information Bill, 2016

Commonwealth Human Rights Initiative's (CHRI) Preliminary Comments & Key Concerns¹

CHRI welcomes the initiative of the Government of Myanmar to draft a legislation to give effect to the peoples' basic human right to access information from the government and other public bodies. The *Universal Declaration of Human Rights* (UDHR) recognises the right of every person to seek, receive and impart information as a basic human right. **Myanmar is one of the 58 countries which signed the UDHR in 1948.** The basic human rights to water, food, health, education and shelter guaranteed under various Articles of the *International Covenant on Economic, Social and Cultural Rights, 1976* (ICESCR) have been interpreted by its treaty monitoring body, namely, the Committee on Economic, Social and Cultural Rights (CESCR) as including the right to seek receive and impart information from government and other State agencies in relation to the enjoyment of those very rights. Myanmar signed the ICESCR in 2015 and is in the process of ratifying it. The *International Convention on the Elimination of all Forms of Discrimination Against Women, 1981* (CEDAW) also recognizes the right of women to receive information from State actors in relation to their health, education and reproductive rights amongst others. Myanmar acceded to this Convention in 1997. Article 13(1) of the *Convention on the Rights of the Child, 1990* recognises the right of every child to seek, receive and impart information regardless of frontiers, either orally, or in print or through any other media of his/her choice. Myanmar ratified the Child Rights Charter in 1991. As a State Party to all these international human rights instruments, Myanmar is duty bound to ensure the practical realisation of the fundamental human rights recognized in them which includes the right of people to seek and receive information from the government.

The 2008 Constitution of Myanmar does not contain an explicit guarantee of the right of the people to demand and obtain information from the government or its agencies. However, the recognition of the Basic Principle that Sovereign Power of the Union is derived from the citizens of Myanmar makes the Government of Myanmar, the custodian of all information created, collated and held by it in the conduct of its routine business, and vests in the people, a claim on the information to seek and receive such information, as a matter of right. It is very encouraging that the Government has come up with a draft law guaranteeing the people access to information.

CHRI's first and foremost recommendation to the Government of Myanmar is to launch a public consultation process around the Draft RTI Bill. RTI laws are primarily intended for the people to use and for public bodies to implement. It is crucial for people to be involved in the exercise of crafting this law. When people are involved in the legislative exercise in a meaningful manner, they will use it effectively to achieve the objectives of the law spelt out in Clause 3 of the Draft Bill and also defend it against attempts to roll it back or undermine its effectiveness.

¹ This preliminary critique of the Draft RTI Bill has been put together by Mr. Venkatesh Nayak, Programme Coordinator, Access to Information Programme, Commonwealth Human Rights Initiative, New Delhi for public discussion and debate in March 2016. This preliminary critique is true to the extent of accuracy of the English translation of the Myanmar version of the Draft RTI Bill circulated within civil society in Myanmar.

CHRI's preliminary comments for strengthening the Draft RTI Bill to make it more effective are given below:

- 1) *Expand the definition of "information"*:** In **Clause 2** the definition of the term "information" does not include "samples" of materials used in public works and other activities of public bodies or "models" created for use such as "scale models" of buildings proposed to be constructed. Section 2(f) of the [Indian RTI Act](#) includes "samples" and "models" within the definition of information. Experience in India showed that corruption in public works or social safety net programmes such as food for work programmes could be unearthed only when official samples of materials used were provided and then tested in laboratories for quality specifications (at the requestor's costs). **So it is advisable to include "samples" and "models" within the definition of "information"**.

- 2) *Indicate clearly that all information held by a public body and created subsequently will be covered by the law*:** The Draft Bill does not indicate clearly that the right of access extends to all information held by public bodies on the date of its enactment and all such information created thereafter. Unless such a clear provision is included, public bodies will argue that all laws apply prospectively and therefore the right of access must extend to such information only which is created after the date of the enactment of the RTI law. The [Indian RTI Act](#) makes it clear in the definitions of "information" in Section 2(f) and the "right to information" in Section 2(j) that the law applies to all information "held by" or is "under the control" of a public body. **A similar clarification must be included in the definition of "information" in the Draft Bill.**

- 3) *Expand the definition of "public body"*:** In **Clause 2(c)** the definitional criteria for a "public body" must be expanded to include all bodies that perform "public functions" or "public activities" also. The RTI laws of [Nigeria](#) and [Liberia](#) are good models to look at for inspiration.

- 4) *Expand the definition of "publish"*:** In **Clause 2(d)** the definition of the term "publish" can be expanded to include many more methods of disseminating information such as use of notice boards, internet websites and also permitting free 'inspection' of information and the records concerned. A good example of the multi-modal dissemination of information is found in the explanation of the term "dissemination" under Section 4(4) of the [Indian RTI Act](#).

- 5) *Drop references to "vexatious request" from Clause 2(h)*:** Experience from other developing countries has shown that the clause relating to "vexatious requests" is often misused to deny even basic information to people on the ground that the requestor is a busy body trying to create difficulties for the public bodies. It is essential that the RTI law encourage people to make information requests rather than put enormous discretion in the hands of Information Officers and public bodies to reject requests on the ground that they are 'vexatious'. **All references to vexatious requests may be dropped for the time being. This issue may be taken up for examination only after sufficient experience**

about the use of the RTI law and the manner of its implementation has been gathered over a period of 5-10 years. Then alone the need for a clause on “vexatious requests” can be discussed based on evidence of the use of the RTI law, as to whether such a restriction is necessary.

- 6) Expand the objectives of the law:** It is commendable that the Draft Bill includes a provision about its objectives in **Clause 3**. However the objectives are very limited. The objectives of such a law can be many more such as- the creation of an informed citizenry, making the working of all public bodies transparent, and for the containment or eradication of corruption. The [Indian RTI Act](#) serves as a good example of a Preamble that recites the objectives of an RTI law. The [Model Access to Information Law adopted by the Organisation of American States](#) contains a good example of a standalone provision that explains the scope and purpose of the law.
- 7) Expand the scope of “rights bearers”:** **Clause 4** of the Draft Bill restricts information access rights to ‘citizens’ of Myanmar. As explained above, RTI is a basic human right that must be available to all persons irrespective of nationality. Myanmar is also a major tourist destination. Foreign tourists or foreign students or foreign workers who visit and live in Myanmar for short or long periods will also have information requirements that they must get as a matter of right. **So the term ‘citizens’ in Clause 4 may be substituted with the term “persons” to cover not only individuals irrespective of origin but also artificial juridical entities such as organisations in the social and private sectors.** The definition of “requestor” in Clause 2 is sufficiently wide to allow for such a change.
- 8) Expand the scope of “voluntary disclosure of information” and make the head of the public body accountable for compliance:** **Clause 9(a)** of the Draft Bill contains a long list of categories of information that are to be disclosed proactively. This is a very positive provision. **However, it is advisable to expand it to cover the following additional categories:**
- a) the terms and grounds on which contracts for any public works or assignments are given out by a public body (to cover private contractors who work for public bodies)**
 - b) all relevant facts and figures relating to important policies and decisions affecting the larger public which the government/public bodies announce from time to time; and**
 - c) give reasons for all administrative and quasi-judicial decisions to persons affected by such decisions.**

The law must also specify that its purpose is to make information accessible to people more and more voluntarily so that the need for making formal information requests is progressively reduced. Please see Section 4(2) of the [Indian RTI Act](#) which contains such a principle. This will in the long run reduce the burden of information requests that come to public bodies for disposal.

Further, the experience in several developed and developing countries shows that in the absence of specific responsibility being pinned on a member of a public body, compliance with voluntary disclosure requirements falls by the way side. **So it is advisable to make the heads of all public bodies responsible for compliance with the voluntary disclosure requirements. This can be done by linking it with the performance appraisal and provision of increments or hike in salary of the heads of public bodies.**

9) Rationalise the grounds for complaint to the Government: Clause 10(a) permits a requestor to make a complaint to the Government if he/she is not granted access to information as per law. This is a welcome provision. However, a requestor will be aggrieved by a public body's actions in many other ways. Experience from the neighbouring countries of Myanmar such as Bangladesh, India, Pakistan and Nepal indicate that a requestor may be aggrieved by any of the following actions or omissions of an information officer/public body: refusal to receive an information request without reasonable clause; non-supply of information within the time limit specified in the law, without reasonable clause; overcharging fees for providing access to information; giving false, misleading or incomplete information or non-compliance with the voluntary information disclosure requirements specified in Clause 9(a). **A requestor who is aggrieved on account of one or more of these issues, must be permitted to make a complaint to the Government. Clause 10(a) may be amended to expand its scope.**

Further, there is no reason why an unlettered person should not seek the assistance of a literate friend or an advocate/lawyer to submit a complaint. **The last sentence in Clause 19(a) may be modified to allow persons to be assisted by their representatives to file complaints.**

10) Permit transfer of requests: Clause 13 requires a public body to inform a requestor of such other body that may hold the information requested if it is not available in its own custody. International good practice requires that in all such cases the requests be transferred to that other public body. Section 6(3) of the [Indian RTI Act](#) makes it mandatory for a public body to transfer a request on such grounds and inform the requestor about such transfer in writing within 5 days. The Information Officer should also be required to make all reasonable efforts to find out which public body is likely to hold the requested information. **For this to be possible, the law must emphasise effective implementation of Clause 9(a) relating to the voluntary disclosure of information. Clause 13 may amended in this manner to create greater convenience for the requestor.**

11) Time limits under the RTI law: Clause 14(a) of the Draft Bill specifies three deadlines for providing access to information, namely, 24 hours, 15 working days which may be extended by another 15 days. The responsibility is left with the public body. **For the sake of greater clarity, it is advisable to specify that the decision to disclose information within the normal or extended timelines must be made by the Information Officer on behalf of the public body. Further, it must also be specified that the Information Officer will convey a decision of rejection of a request for access to information within a similar period of time. Further, it is necessary to clarify that the extension of the time**

limit for giving a decision on the request could also include a situation where a third party's objections against disclosure have been sought. Under Section 11 of [the Indian RTI Act](#) third party information requests are to be dealt with in 40 calendar days while other requests are to be dealt within 30 calendar days.

12) Cost of providing information must be reasonable: Clause 15(a) refers to supply of information to a requestor on payment of "actual cost". Clause 17 indicates that the actual cost of finding the information may be charged on the requestor. Experience shows that public bodies often include costs such as wages of officers involved in supplying the information, fees for time spent on searching for the records, capital costs and working costs of the public body while calculating the payment that a requestor should make for obtaining such information. Often such actions are intended to charge very high payments in order to discourage a requestor from seeking information. The salary of the employees of government departments and organisations are already paid for by the taxpayer. There is no need to impose further costs on the requestor. **In order to prevent such unreasonable actions, the RTI law must stipulate that all payments for providing information must be reasonable and should not only cover the cost of reproducing the information., Further, where the information sought is voluminous, the law must permit the requestor to inspect the files, take notes and identify the specific papers which may be photocopied and provided on payment of the actual cost of reproduction. All decisions of the Information officer seek payments for supply of information should be open to challenge before a specified authority.** Please see Sections 7 and 19(1) of the [Indian RTI Act](#) for similar provisions.

13) Providing access after severing exempt information: Clauses 15(b) and 22 recognize the possibility that some of the information sought by a requestor may be covered by one or more exemptions provided for in the law, while other parts of the information may be fit for disclosure. This is generally referred to as the doctrine of "severability". However the two clauses are placed far apart in the law. **It is recommended that Clause 22 be placed right beneath Clause 15(b) as a new sub-clause for the sake of clarity and easy reference.**

14) Declining access to information already published: Clause 15(e) permits the rejection of a request for information on the ground that it has already been published in some way or is easily accessible. It is positive that the requester is required to be advised on how to access such information. However, experience shows that often information published in printed form is not easily accessible after the copies are exhausted. A classic example is that of Gazette notifications or the printed publications published by governments. Unless efforts are made to make available such notifications/publications in electronic form on websites, they may not be easily accessible to people after the copies have been exhausted. According to statistics available in the public domain internet penetration in Myanmar is as low as 32%². More than 2/3rds of the people will

² "5 Facts about the Internet Market in Myanmar" published at: <http://mmrdrs.com/2015/09/24/5-facts-about-the-internet-market-in-myanmar/>, accessed on 08 March, 2016.

not be able to access websites easily. **So it is advisable to amend Clause 15(e) to require the Information Officer to provide printed copies or photocopies of information already published earlier, on request. The RTI law should aim to serve the lowest common denominator in society, foremost, as it is these segments that will be in urgent need of information from the government and other public bodies to secure their rightful entitlements.**

15) Declining access on grounds of administrative efficiency: Clause 16 requires an Information Officer to provide access to information to a requestor in the form in which he/she seeks it. However this right is controlled by two exceptions – administrative efficiency and preservation of the records. In all probability, the first exception will be often used to deny access to information stating that it will interfere with the duties and responsibilities of the public body. It must be recognised that transparency of the actions of a public body is in the public interest. Just as much as no public body will complain about internal disturbance of its duties and responsibilities if it is mandated by law to collect a new tax or duty, every public body should diligently comply with the transparency requirements under an RTI law in equal measure. Both laws impose statutory obligations which cannot be ignored. The RTI law must provide for solutions to the Information Officer when dealing with problematic information requests. If the request is for voluminous information, then the law must place a duty on the Information Officer to speak with the requestor and find a reasonable solution for providing access to information in smaller tranches or by asking him/her to prioritise the request.

The second exception given in Clause 16 is valid no doubt. The safety and preservation of a record is the responsibility of every public body. So if making photocopies from an old record is likely to damage it, then the law must clarify that the Information Officer may provide access to the requestor by permitting inspection of the record. He/she may take notes during the inspection or photograph the records at his/her own expense. The law should permit these options of access to information. **Clause 16 may be amended as suggested above.**

Further, there is no clear elucidation of the forms of access to information that may be provided in the proposed RTI law even though Clause 16 talks about form of access. The law must specify the varied forms of access such as taking photocopies, inspecting the files, records and ongoing public works, taking notes or photographs at one's own cost during the inspection, seeking certified or attested copies of the records, seeking information in electronic form etc. Section 2(j) of the Indian RTI Act contains a useful description of the forms of access to information which may be provided to a requestor. **A similar definition of "right to information" may be inserted in Clause 2 of the Draft RTI Bill.**

16) Exemption for untimely disclosure of economic activity: Clause 18(d)(1) permits a public body to refuse access to information if it would result in the untimely disclosure of a proposed economic activity. This is an overbroad exemption and can be misused. It is not uncommon for public bodies to forcefully implement an economic project such as a

power plant, or a mining project or a polluting factory or some other environmentally damaging activity which also may adversely affect the lives of several people without much public consultation or impact assessment. In all such cases the people should have the right to know the justification for the project and the mitigating actions being planned or undertaken by the public body. This is essential for them to be able to make representations to the Government against the economic harmful project so that alternatives could be found. Such disclosure of information about proposed economic activity is in the public interest and is also in tune with international best practice standards of RTI legislation. For example, Section 4(1)(c) of the [Indian RTI Act](#) requires every public body in India to voluntarily disclose all relevant facts while announcing important decisions or policies that affect the larger public. **Clause 18(d)(1) may be amended to remove the phrase “untimely disclosure of (economic) activity being proposed.**

17) Exemption for internal deliberative processes: Clause 18(e) is also overbroad. In keeping with the recommendation made at para #16 above, this clause must be amended to allow timely disclosure of information to the people on decisions or actions that affect them so that they may engage with the government to provide their feedback.

18) Exemption for personal information of prominent persons: Clause 18(f) seeks to protect the privacy of individuals which is a fair and just restriction on RTI. However there are two problems with the formulation of this clause. This exemption applies only to “prominent persons”. This is unreasonable. Section 357 of the Constitution makes it a duty of the State to protect the privacy of “every citizen” in relation to his/her home, property, correspondence and other communications. **So the protection of Clause 18(f) should be available to all individuals whether they are ‘prominent’ or not.**

19) Clause 18(g) relates to non-disclosure of information if a person does not waive his/her right of confidentiality. This clause in its current formulation seems to apply only to the context of an ongoing trial rather than a situation where a request for such information must be decided by the Information Officer. **So it is advisable to amend this clause to read like an exemption to disclosure.**

20) Exemption relating to trade or financial confidence: Clause 18(h)(2) exempts access to confidential or trade information if disclosure will damage the interests of the third party. This exemption is overbroad. **It must be restricted only to the “lawful” or “legitimate” trade or financial or commercial interests of a third party and not all kinds of interests.**

21) Need for a new exemption to protect the integrity of an examination or interview process: The Draft RTI Bill does not include an exemption that exempts access to information relating to examinations or interview processes such as question papers, names of interviewers (prior to the interview) or names and addresses of examiners and invigilators. Providing access to such information in advance will compromise the integrity of these processes by creating an undue advantage for the requestor over the

others. ***So a new exemption may be added in Clause 18 to protect the integrity of an examination process as follows:***

“The disclosure of information will compromise the integrity of an examination process or any process for selecting candidates for recruitment or promotion based on merit.”

22) Streamlining “third party” information access procedures: Clause 19 of the Draft RTI Bill relates to dealing with requests for information about third parties. This procedure must be linked to specific timelines for consultation with then third party and then making a decision by the Information Officer regarding disclosure. In accordance with our recommendation on this issue contained in para #11 above it is recommended that strict deadlines for completing the consultation process with third parties be laid down in the law. Further, this Clause should also require an Information Officer to make a decision about disclosure in accordance with this RTI law itself and not any other extraneous consideration. If the objections of a third party to disclosure can be directly connected to one or more of the exemptions provided for in this law, then disclosure will not be allowed. If such a linkage cannot be made then, disclosure must be allowed only after the final appellate authority under this law has ruled in favour of disclosure. Just as a requestor has a right of appeal, a third party must also have similar rights to challenge all decisions of disclosure of their ‘confidential information’. **Section 11 of the [Indian RTI Act](#) can serve as a model for making these changes.**

23) Applicability of other laws: Clause 20 appears to contradict Clause 5 of the Draft RTI Bill. A good RTI law must be the sole determining authority regarding transparency or otherwise, in order to avoid confusion and conflict with other laws. If other laws permit the maintenance of confidentiality of certain categories of information and if there is a legitimate public interest to be protected by maintaining such confidentiality, then that must be reflected in the exemptions list of the RTI law. If not the Information Officers and public bodies will only face confusion in applying the RTI law in specific cases. The Indian RTI Act takes care of this problem in a practical way. Section 22 of the [Indian RTI Act](#) gives it an overriding effect on all other laws to the extent of inconsistency. In other words, if the confidentiality for a certain category of information provided in some other law cannot be justified under the RTI law, then such information will have to be disclosed on request. **Clause 20 may be deleted in view of Clause 5 which is in tune with international best practice standards. Clause 5 may be reworded to make it stronger in terms of the assertion of the supremacy of the RTI law in matters of transparency.**

24) Public interest override clause is missing: There is no provision in the Draft RTI Bill for allowing access to exempt information if public interest in it is of an overbearing nature. Section 8(2) of the [Indian RTI Act](#) permits access to even exempt information if the public interest in disclosure outweighs the harm to the protected interests. It is recommended that such a clause be included in the Draft RTI Bill.

25) Sunset clause may be made of shorter duration: Clause 23 permits the applicability of the exemptions listed in Clause 18, sub clauses (a) to (f) for a period of 20 years. However the Government has the discretion of extending them by another 15 years. This implies that certain categories of information will be inaccessible beyond the lifetime of an entire generation of people. **It is recommended that the sunset clause be limited to a period of 10 years only initially and the government be given the discretion to extend it at the most by another 5 years and no more.** This is in tune with international best practice standards.

Second, the sunset clause does not seem to apply to Clause 18(g). This is not in tune with international best practice standards. **Even such information should be accessible to people after a 10-15 year period as in all likelihood, the information may have lost its commercial sensitivity.**

26) “No reasons required” and “burden of proof” clauses must be inserted: The Draft Bill does not mention on whom the burden of proving that the access to information may not be allowed to protect a recognized public interest, namely an exemption specified in Clause 18, is placed. It is international best practice for laws to reverse the burden of proof on the public body that seeks to protect the information from disclosure in the larger public interest. Section 19(5) of the [Indian RTI Act](#) provides a model for crafting such a provision. Simultaneously, the Draft RTI Bill must also include a provision that exempts a requestor from justifying why he/she wants the information unless an urgent request is made under Clause 14(a) for disclosure in 24 hours. It is international best practice not to require a requestor to give reasons for seeking information. Section 6(2) of the Indian RTI Act is a good example of this practice. **Similar clauses may be inserted in the Draft RTI Bill to provide such protections to the requestor.**

27) Absence of an independent appellate body: It is international best practice to establish an independent authority to whom appeals against a decision of refusal may be made after the internal appellate procedure has been exhausted. While the first tier of appeal against a decision of rejection may lie within the Government, there must be a second tier of appeal outside the Government. The Government being an interested party in the information sought by a requestor, is not likely to be able to judge the case impartially. This would also be against a basic principle of natural justice, namely, *nemo iudex in causa sua* (nobody shall be a judge in his own case). The RTI laws in [India](#), [Nepal](#), [Bangladesh](#) and the provinces of [Punjab](#) and [Khyber Pakhtunkhwa](#) in Pakistan, [Indonesia](#) and [Mexico](#), all provide for an independently appointed multi-member Information Commission to deal with appeals of the 2nd tier. This is a much more people-friendly mechanism where information access disputes may be disposed of in a cost-effective and non-cumbersome manner. The Information Commissioners must be selected through an independent and consultative process. They must also be guaranteed financial, operational and staffing autonomy to be able to work outside of undue influence of the Government. Information Commissions, the world over are designed to function as the champions of transparency. **The RTI laws for which hyperlinks are provided above contain several useful models for an Information Commission for**

Myanmar to adopt. Requestors may approach courts later on if they are dissatisfied with the decision of the Information Commission.

28) Inadequate penalty regime: Clauses 27 and 28 contain a provision for imposing penalties for contravention of the RTI law. However, these clauses do not specify which body is authorized to impose such penalties. Presumably it will be imposable by courts. This must be specified in the law itself. It is also advisable to include a regime of administrative penalties to be imposed on Information Officers for contravening the RTI law such as refusing to receive a request for information without reasonable cause, not providing information within the time limits without reasonable cause, knowingly providing false, incomplete or misleading information or *malafidely* denying access to information. **The powers to impose such administrative penalties must be vested in the Information Commission that has been recommended for inclusion in the Draft Bill. Other serious offences may be tried in courts hose identity must be specified in the RTI law itself.**

29) Insert annual reporting provision: There is no provision in the Draft Bill for public bodies to report on the action they have taken during a year to implement the RTI law. It is important for such reporting procedures to be established to assess whether public bodies are complying with the requirements of the law or not. Reporting must include providing data about information requests received and processed, number of rejections and reasons for such rejection, amount of payment collected for providing access to information, measures recommended for improving the implementation of the RTI law etc. Such a report must be sent to the proposed Information Commission by all public bodies. The Information Commission in turn should be required to report to Parliament of Myanmar annually about what is being done to implement the RTI law. It is important for the Parliament of Myanmar to find out how the RTI law is being implemented. A good example of the reporting provisions can be found in Section 25 of the [Indian RTI Act](#).

30) Insert public education and officer training provisions: There is no provision in the Draft RTI Bill for educating the general public about their rights under this law. Also, there is no requirement for training government employees to implement this law. Both as essential requirements for the successful implementation of this law. Unless the people are educated about their rights, they will not seek information using this law. Unless the officials of public bodies are educated about their duties and protections under the RTI law, secrecy will become their default option. Good models of provisions for training officials and educating the people about their rights are available in the RTI laws of [India](#) and [Bangladesh](#). **New provisions may be inserted in the Draft RTI Bill to provide for public education and officer training on RTI in Myanmar based on these models.**
